

CUMMINS ROCKY MOUNTAIN, LLC
INCENTIVE AGREEMENT

THIS AGREEMENT (this "Agreement") is entered into as of the ____ day of _____, 2009, between the Redevelopment Agency of West Valley City, a governmental entity organized under the laws of the State of Utah (the "Agency") and Cummins Rocky Mountain, LLC ("Cummins") (collectively the Agency and Cummins are referred to as the "Parties").

W I T N E S S E T H:

WHEREAS, the Agency has determined that it is in the best interest of West Valley City to provide an incentive to Cummins in order to ensure the location of their business and related investments in West Valley City; and

WHEREAS, to enable the Agency to achieve the objective of Cummins locating their business and related investments in West Valley City, the Agency held a public hearing regarding the incentive payment to Cummins; and

WHEREAS, Cummins desires to develop the Property located in West Valley City more specifically defined herein as the "Site" for and in accordance with the uses specified in this Agreement; and

WHEREAS, the Agency believes that the redevelopment of the Site, pursuant to this Agreement, is in the vital and best interest of the Agency and in the vital and best interest of the health, safety and welfare of West Valley City and its residents, and in accord with the public purposes and provisions of the applicable State laws and requirements under which the development is undertaken and is being assisted by the Agency; and

WHEREAS, the Agency, on the basis of the foregoing, is willing to assist in the development of the Site for the purpose of accomplishing its development in accordance with the provisions of this Agreement;

NOW, THEREFORE, each of the Parties hereto, for and in consideration of the mutual promises and performances set forth herein, does covenant and agree as follows:

1. Purpose. This Agreement is intended to set forth the rights and obligations of Cummins and the Agency with respect to the location and operation of a Cummins facility in West Valley City and certain incentive payments from the Agency to facilitate Cummins investment and operations on the Site. The Agency and the City expect that Cummins will renovate and improve the existing Site by the physical renovation of existing buildings, the installation of equipment and other fixed assets, and the ongoing operation of Cummins business on the Site. Upon compliance with the terms of this Agreement, the Agency will assist Cummins by paying to Cummins certain funds as described in this Agreement. The Agency and/or City expect to recoup those funds through the increased taxes generated by the renovations and

improvements that are constructed or remodeled by Cummins within the Site and by Cummins operations.

2. Definitions.

The capitalized terms used in this Agreement have the following meanings:

- A. Agency. The term “Agency” means the Redevelopment Agency of West Valley City, a public body, exercising its functions and powers and organized and existing under the former Utah Neighborhood Development Act and existing Utah Redevelopment Agencies Act or any replacement act (the “Act”), including any successor public agency designated by or pursuant to Law.
- B. Improvements. The term “Improvements” means all of the physical construction, remodeling, renovations, and installations existing and/or to be made by Cummins on the Site, including, without limitation, all improvements, fixtures, other real property, equipment, furniture, furnishings and other personal property subject to ad valorem taxes to be constructed and/or installed on the Site by Cummins in order to establish and operate their business on the Site, together with all existing improvements. All Improvements on the Site shall comply with the City’s zoning, building, parking, sign and other ordinances and regulations.
- C. Incentive Payment(s). Shall mean the seven annual payments of \$50,000 from the Agency to Cummins in accordance with the terms of this Agreement. The total of all Tax Incentive Payments shall not exceed \$350,000.
- D. Site. The term “Site” means all of the property and structures located at 2167 South 5370 West in West Valley City and described in the Site Legal Description which is attached to this Agreement as Exhibit No. 1.
- E. Substantial Completion. The term “Substantial Completion” or “Substantially Complete” means that Cummins has moved onto the Site and have expended at least \$1,250,000 in retrofitting or improving the Site.

3. Conditions Precedent. As conditions precedent to the Agency’s obligation to pay any yearly Incentive Payment to Cummins, Cummins shall perform or satisfy the following conditions precedent:

- A. Sales. Beginning with the year 2010 and for each subsequent year of this agreement, Cummins shall generate at least \$10,000,000 in gross sales from its operations on the Site.

- B. Building Permit(s). Cummins shall have obtained the building permit or permits from the City for the remodeling and/or construction of the Improvements to be remodeled or constructed.
- C. Construction, Renovation and Installation of Improvements. Cummins shall have Substantially Completed the Improvements and shall provide the Agency with written documentation to demonstrate, to the Agency's reasonable satisfaction, that Cummins has invested at least \$1,250,000 in the Improvements on the Site.
- D. Payment of Taxes. Subject to the provisions of Section 6 of this Agreement, Cummins agrees that it shall pay all ad valorem taxes and sales taxes, and, if applicable, interest and penalties, relating to the Site for each year of this Agreement.
- E. Conditional Use Permit. Cummins shall be in compliance with the terms of any conditional use permit for the Site and the conditional use permit shall be in good standing and shall not have been revoked.
- F. Business License. Cummins is in compliance with the business licensing ordinances of West Valley City and has a valid West Valley City Business License.
- G. Equipment and Operations. During the year of the Incentive Payment, Cummins shall have not removed or substantially reduced the value of the Improvements on the Site or discontinued a substantial portion of its operations on the Site.

4. Obligations of the Agency.

- A. Payment of Incentive Payments to Cummins. Subject to the yearly satisfaction of the conditions precedent set forth in Section 3 above, the Agency agrees to pay to Cummins an Incentive Payment of \$50,000 per year for seven years. Subject to the Conditions Precedent, the first Incentive Payment shall be made on or before December 31, of each year of this Agreement. The first Incentive Payment shall be made in 2009 and the final Incentive Payment shall be made in 2015. The total of all Incentive Payments shall not exceed \$350,000.
- B. 2009 Incentive Payment. The Agency shall make the 2009 Incentive Payment if Cummins is in compliance with all Conditions Precedent set forth above, except for the requirement set forth in Paragraph 3(A) above. For the 2009 year, Cummins shall not be required to meet the gross sales requirement set forth in that paragraph.
- C. 2010 to 2015 Incentive Payments. For the years 2010 to 2015, in any year during which Cummins meets all of the Conditions Precedent except for the gross sales requirement of Paragraph 3(A) above, the Incentive

Payment for that year shall be reduced and the Agency shall only be required to pay a pro-rated Incentive Payment to Cummins. The proration shall be based on the percentage derived from ratio of actual gross sales to \$10,000,000.

- D. Catch up Provision. If any Incentive Payment for the years 2010 to 2015 is reduced as set forth in Section 4(C) above, Cummins may recoup the lost incentive by exceeding \$10,000,000 in gross sales in subsequent years. For any year from 2011 to 2015 in which Cummins exceeds \$10,000,000 in actual gross sales, it shall be entitled to receive an additional pro-rata Incentive payment based on the percentage by which Cummins actual sales exceed \$10,000,000. This additional Incentive Payment shall be limited to recovering Incentive Payments that were reduced in preceding years under the terms of Section 4(C) and shall also be limited by the \$350,000 total Incentive Payment cap set forth in Section 4(A) above.
- E. Failure of Conditions Precedent. If during any year of this Agreement Cummins is not in compliance with the Conditions Precedent set forth in Paragraph 3 above, other than the sales requirement of paragraph 3(A), then the Incentive Payment for that year shall be forfeited and the total of all Incentive Payments shall be reduced by that amount.
- F. Terms and Conditions of Payment. The Agency's payment of the Incentive Payment shall be made subject to the following terms and conditions.
 - (a) Unless otherwise specifically set forth in this Agreement, no interest shall be paid by the Agency on any Annual Available Tax Increment Payment.
 - (b) Cummins understands and agrees that:
 - (i) Incentive Payment funds will be included in the annual Agency budget during the term of this Agreement and are subject to annual appropriation of the Agency Board.
 - (ii) The Agency is not a taxing entity under Utah law;
 - (iii) The Agency has no power to levy a property tax on real or personal property located within the Site;
 - (iv) The Agency has no power to set a mill levy or rate of tax levy on real or personal property;
- G. Any Incentive Payments made by the Agency under the terms of this Agreement shall cease upon the expiration or termination of this Agreement or the Agency's payment of a total of \$350,000 to Cummins

and the Agency shall not be obligated to pay any additional funds to Cummins.

5. Payment of Taxes.

- A. Subject to Cummins's right to protest or appeal as provided below, during the Term of this Agreement, all ad valorem taxes and assessments levied or imposed on the Site, any of the Improvements, and any personal property on the Site for any period commencing after the Improvements are completed on the Site by Cummins shall be paid annually by Cummins on or before the due date which is currently set by law as November 30.
- B. Cummins shall have the right to protest or appeal the amount of Assessed Taxable Value levied against the Site by the County Assessor, State Tax Commission or any lawful entity authorized by law to determine the ad valorem assessment against the Site, the Improvements or any portion of the Site or Improvements in the same manner as any other taxpayer as provided by law. Cummins shall, however, notify the Agency in writing within ten (10) calendar days of Cummins's filing of any protest or appeal to such assessment determination and provide a copy to the Agency of any protest or appeal of such assessment and information submitted as part of the protest or appeal. In addition, Cummins shall give to the Agency written notice at least fifteen (15) calendar days prior to the time and date that such protest or appeal is to be heard. The Agency shall have the right, without objection by Cummins, to appear at the time and date of such protest or appeal and to present oral or written information or evidence in support of or objection to the amount of assessment which should or should not be assessed against the real or personal property of the Site and the amount of the Agency's Project Area indebtedness or outstanding obligations.

6. Term. This Agreement shall remain in effect until December 31, 2015, provided, however, that the following events shall terminate this Agreement earlier:

- A. Failure to Commence Construction of Improvements. If Cummins fails to occupy the Site or commence the construction or installation of the Improvements prior to December 31, 2009, then the Agency may terminate this Agreement, in which case, the Agency shall not be obligated to make any payments to Cummins.
- B. Failure to Complete the Improvements. If the Improvements are not Substantially Complete by and Cummins is not conducting its operations on the Site by December 31, 2010, then the Agency may terminate this Agreement, in which case, the Agency shall not be obligated to make any payments to Cummins.

7. Confidentiality. Pursuant to Section 63-2-304, Utah Code Annotated, Cummins hereby claims business confidentiality protection for documents and materials provided to the Agency pursuant to this Agreement. This claim of business confidentiality is based upon the following reasons:

- A. Disclosure of the planning or financial records of Cummins will place Cummins at a competitive disadvantage with competing facilities.
- B. Disclosure of the planning or financial records of Cummins will substantially harm Cummins in the negotiation of third party leases and contracts for other facilities.
- C. Disclosure of the planning or financial records of Cummins may reveal trade secrets of Cummins.

Based on the foregoing claim and representations of Cummins, and for the reasons set forth above, the Agency agrees to classify the financial information it receives pursuant to this Agreement as protected records pursuant to Section 63-2-308, Utah Code Annotated. To the fullest extent it is able to do so consistent with applicable requirements of law, the Agency shall endeavor to ensure the confidentiality of all financial records it receives from Cummins pursuant to this Agreement; provided, however, that the Agency may, upon 15 days' prior written notice to Cummins, disclose such materials pursuant to the order of a court of competent jurisdiction.

8. Conflict of Interest – Agency. No official, employee, consultant, or agent of the Agency shall have any personal interest, direct or indirect, in this Agreement, nor shall any such member, official, or employee participate in any decision relating to this Agreement which affects his personal interests or the interests of any corporation, partnership, or association in which he is directly or indirectly interested.

9. Notices. A notice or communication under this Agreement, by either Party to the other, shall be sufficiently given or delivered, if given in writing by personal service, express mail, FedEx, DHL or any other similar form of courier or delivery service, or mailing in the United States mail, postage prepaid, certified, return receipt requested and addressed to such Party as follows:

- A. In the case of a notice or communication to the Agency, Executive Director, Redevelopment Agency of West Valley City, 3600 Constitution Boulevard, West Valley City, Utah 84119-3027, with a copy to West Valley City Attorney, Attorney for the Redevelopment Agency of West Valley City, 3600 Constitution Boulevard, West Valley City, Utah 84119-3027.
- B. In the case of a notice or communication to Cummins, addressed to the principal office of Cummins located at 390 Interlocken Crescent, Suite 200, Broomfield, Colorado, 80021

- C. Notice to any Party may be addressed in such other way that Party may, from time to time, designate in writing dispatched as provided in this Section.

10. Headings. Any titles of the several parts and sections of this Agreement are inserted for convenience of reference only and shall be disregarded in construing or interpreting any of its provisions. "Paragraph" and "section" may be used interchangeably.

11. Successors and Assigns of Cummins. This Agreement may be assigned by Cummins and, provided that the assignee shall comply with its terms and shall maintain a substantially similar type of business, shall be binding upon and inure to the benefit of the Cummins and its successors and assigns. Where the term "Cummins" is used in this Agreement, it shall mean and include the Cummins' successors and assigns.

12. Governing Law. This Agreement shall be interpreted and enforced according to the laws of the State of Utah.

13. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed to be an original, and such counterparts shall constitute one and the same instrument.

14. Complete Agreement. This Agreement and its Attachments contain the complete agreement of the parties, and supersede all prior and contemporaneous negotiations, representations and agreements of the parties with respect to the subject matter hereof. This Agreement may be amended or modified only in writing, executed by both Parties.

IN WITNESS WHEREOF, the Agency has caused this Agreement to be duly executed in its behalf and its seal to be hereunto affixed and attested; and Cummins has caused the same to be duly executed in its behalf, on or as of the day and year first above written.

REDEVELOPMENT AGENCY OF
WEST VALLEY CITY

By: _____
Chief Executive Officer

ATTEST:

Sheri McKendrick, Secretary

Approved as to form:

Redevelopment Agency Legal Counsel

Cummins Rocky Mountain, LLC

By: _____

Title: Managing Member

State of _____)
:SS
County of _____)

On this _____ day of _____, 2009, personally appeared before me _____ whose identity is personally known to me or proved to me on the basis of satisfactory evidence, and who affirmed that he/she is the Managing Member of Cummins Rocky Mountain, LLC, a limited liability Cummins, by authority of its members or its articles of organization, and he/she acknowledged to me that said limited liability Cummins executed the same.

Notary Public

**EXHIBIT 1
TO
CUMMINS ROCKY MOUNTAIN, LLC,
INCENTIVE AGREEMENT**

Site Legal Description

LOT 3, WEST VALLEY TRUCK CENTER. LESS & EXCEPTING BEG AT THESE COR OF LOT 3 SD SUB; S 89°40'47] W 107.33 FT; N 00°06'42]E 172.66 FT; N 89°40'47] E 107.33 FT; S 00°06'42] W 172.66 FT TO BEG.

Parcel ID Number 14-24-126-008